No. 9, Original

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In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PLAINTIFF,
v.
STATE OF LOUISIANA, ET AL.

RESPONSE BY THE STATE OF LOUISIANA TO THE MOTION BY THE UNITED STATES FOR LEAVE TO FILE ACCOUNT OF FUNDS RELEASED FROM IMPOUNDMENT PURSUANT TO THE SUPPLEMENTAL DECREE (NO. 3) OF DECEMBER 20, 1971 AND TO THE ACCOUNT BY THE UNITED STATES OF FUNDS RELEASED FROM IMPOUNDMENT PURSUANT TO THE SUPPLEMENTAL DECREE (NO. 3) OF DECEMBER 20, 1971

and

MEMORANDUM IN SUPPORT OF RESPONSE

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Attorney General.
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State of Louisiana,
State Capitol,
Baton Rouge, Louisiana 70804.

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The State of Louisiana by the Attorney General of Louisiana responds to the Motion of the United States for leave to file account with respect to the funds released to it December 29, 1971 and informs the Court that Louisiana has not had an opportunity to verify the information stated by the United States and so is without knowledge or information sufficient to form a belief as to the correctness thereof and reserves the right to object to errors prior to the final settlement of the account between the United States and the State

of Louisiana pursuant to the Agreement of October 14, 1956 and the ultimate decree of this Court.

Respectfully submitted.

WILLIAM J. GUSTE, JR.,
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State of Louisiana,
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By: /s/ Frederick W. Ellis

September 1972.

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MEMORANDUM IN SUPPORT OF RESPONSE

On December 13, 1965, the Court rendered its first Supplemental Decree in this case, 382 U.S. 288, which provided for accountings to be filed thereunder. That decree and subsequent accountings by both parties were the subjects of extensive negotiations and exchanges of information extending over many months, both before and after the decree and the accountings pursuant thereto. Nonetheless, in spite of the extensive exchanges of engineering, cartographic, financial, and accounting material and records, some differences of position could not be successfully resolved. However, a great mass of problems was eliminated and extensive judicial controversy avoided. Remaining problems were the subject of objections by both parties filed with the Court. The retention of jurisdiction clause under the December 13, 1965

decree provided for "further adjustments of the accounting between the parties." 382 U.S. 288, 295. In its filing entitled, "OBJECTIONS BY THE STATE OF LOUISIANA TO THE ACCOUNTING FILED BY THE UNITED STATES OF AMERICA PURSUANT TO SUPPLEMENTAL DECREE NO. 1, DATED DECEMBER 13, 1965," Louisiana's rights were reserved "to seek payment through application for a further supplemental decree or otherwise." In its Objections dated April 1966, the United States remarked, "We make no argument in support of our objections at this time, as it is our understanding that under paragraph 8 of the Supplemental Decree these objections merely serve to preserve the points raised, and that argument in support of them should be deferred until the issues are presented to the Court by motion for settlement of the account as provided by paragraph 8 of the Supplemental Decree."

The form of Supplemental Decree (No. 3) dated December 1971 did not treat details of time periods for accountings and procedure. Nor does the form of the proposed Supplemental Decree (No. 4) now pending on motion by Louisiana, unopposed by the United States, treat such procedural details. This was for the obvious reason that both parties contemplated further negotiations before adversary proceedings would be required, if they would be required, to resolve the pending objections filed by both parties in connec-

tion with the First Supplemental Decree dated December 13, 1965.

Moreover, after the resolution of the coastline controversy and adjudication of the boundary as to all remaining disputed areas in the coastline proceedings before the Special Master, further accounts must be prepared and an overall accounting had.

More than three hundred mineral leases are the subject of the present "account". At least sixteen years and perhaps as much as two decades or more of monthly financial records pertaining to these leases must be audited. This entails comparison of enormous volumes of Federal records to oil company records scattered in various cities around the nation. The enormity of that undertaking is manifest from the fact that the statement of money received was filed with the Court only after more than eight months had elapsed since December 20, 1971, although payments are made to the United States by the producers pursuant to the Interim Agreement of October 14, 1956.

Louisiana is confident that an exchange of information between the United States and Louisiana and negotiations between counsel and technical experts of both governments can avoid most, if not all, of the possible controversies which could now occur if the Court were called upon to give positive or tacit approval of the account.

The motion does not seek such approval and this response is filed only to preserve rights and to make certain that silence is not taken for acquiescence.

Respectfully submitted.

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Attorney General.

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State of Louisiana,
State Capitol,
Baton Rouge, Louisiana 70804.

By: p/Frederick W. Ellis

September 1972.

PROOF OF SERVICE

I, the undersigned, authorized to act on behalf of the State of Louisiana, certify that copies of this response and memorandum have been properly served on the 13th day of September, 1972, by mailing copies, sufficient postage prepaid, to the offices of the Solicitor General and Attorney General of the United States, Department of Justice, Washington, D. C. 20530.

s/ Frederick W. Ellis

FILED
JUL 31 1974
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OCTOBER TERM, 1974

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UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.,
Defendant.

REPORT OF WALTER P. ARMSTRONG, JR. SPECIAL MASTER

July 31, 1974

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3080

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REPORT OF WALTER P. ARMSTRONG, JR. SPECIAL MASTER

PRELIMINARY

In *United States* v. *Louisiana,* (1960) 363 U.S. 1 (hereinafter cited as the "first Louisiana opinion"), the Court held that by the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C.A. §§1301-1315, the United States has quitclaimed to the State of Louisiana the lands underlying the Gulf of Mexico within three geographical miles of its coastline, which under said Act is defined as "the line of ordinary low-water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." In *United States* v. *State of Louisiana, et al.,* (1969) 394 U.S. 11 (hereinafter cited as the "second Louisiana opinion"), the Court then laid down certain rules and precepts for the

determination of the location of said boundary. In many instances these were self-executing, and required no further investigation or findings; but in others, the determination of the boundary under the rules laid down by the Court depends upon the determination of certain disputed facts. In *United States* v. *California,* (1965) 381 U.S. 139 (hereinafter cited as the "California case"), the Court had adopted for purposes of defining "inland waters" within the meaning of the Submerged Lands Act the definition contained in the International Convention on the Territorial Sea and the Contiguous Zone ratified by the United States in 1961 (15 U.S.T. (pt. 2) 1606, T.I.A.S. No. 5639, 1964). In the second *Louisiana* opinion, the Court held that the adoption of that definition was not simply for the purpose of delineating the California coast but for the general purpose of defining the term as used in the Submerged Lands Act, saying:

> "Congress left to this Court the task of defining a term used in the Act, not of drawing state boundaries by whatever method might seem appropriate in a particular case. It would be an extraordinary principle of construction that would authorize or permit a court to give the same statute wholly different meanings in different cases, and it would require a stronger showing of congressional intent than has been made in this case to justify the assumption of such unconfined power." (394 U.S. 11, 34)

The Court continued:

> "Moreover, adoption of a new definition of inland waters in this case would create uncertainty and encourage controversy over the coastlines of other States, unsure as to which, if either, of the two definitions would be applied to them." (394 U.S. 11, 34-35)

Accordingly, the Court held that that part of Louisiana's coastline which, under the Submerged Lands Act, consists of "the line marking the seaward limit of inland waters," should be drawn in accordance with the definitions of the Convention on the Territorial Sea and the Contiguous Zone.

However, as has been noted, the actual determination of this line under the provisions of that Convention in some cases depends upon factual determinations of disputed facts. As the Court said:

> "Many issues divide the parties concerning the application of the provisions of the Convention on the Territorial Sea and the Contiguous Zone to the Louisiana coast. Some of these issues, which involve simply interpretation of the Convention, we have been able to decide on the basis of the materials now before us. Others, however, are primarily factual questions involving the construction and application of the Convention's provisions with respect to particularized geographical configurations. Several of these factual disputes cannot be properly resolved without evidentiary hearings, and as to others we think it would be wise at all events in this technical and unfamiliar area to have the benefit, preliminarily, of the judgment of a detached referee. Accordingly, we have decided to refer to a Special Master the task of resolving in the first instance several of the particularized disputes over the precise boundary between the submerged Gulf lands belonging to the United States and those belonging to Louisiana." (394 U.S. 11, 35-36)

Accordingly, by order entered May 19, 1969 (395 U.S. 901) the undersigned was appointed as Special Master in the cause "to make a preliminary determination consistent with the opinion of this Court."

Pursuant to this reference, pre-hearing conferences were held before the Special Master on September 29 and December 5, 1969 and on March 9, 1970, the results of which were embodied in a Pretrial Order entered in the cause on April 27, 1970. Thereafter evidentiary hearings were held before the Special Master in New Orleans, Louisiana on September 28 through October 2, October 5 through October 9, October 19 through October 23 and October 26 and 27, 1970; in Washington, D. C. on January 18 through 22 and January 25 through 29, 1971; and in Baton Rouge, Louisiana on April 26 through 30, 1971. The transcript of these hearings occupies 46 volumes containing a total of 6,444 pages. During the course of these hearings the State of Louisiana offered 356 separate exhibits and the United States offered 419, all of which were received subject to appropriate objections, ruling upon which, like that upon objections to the testimony offered, were reserved.

During the course of the proceedings, two additional orders were entered, on December 2, 1970 and March 25, 1971 respectively. Thereafter, on October 20, 1971 and February 6, 1972 Post Hearing Orders were entered in the cause by the Special Master, and on February 6, 1972 inspection was permitted in New Orleans, Louisiana of certain documents requested of the United States by the State of Louisiana in connection with which a privilege was claimed by the United States, pursuant to certain rules and regulations laid down by the Special Master, his ruling upon the conditions under which this material could be used by the State of Louisiana being embodied in an additional order dated May 15, 1972. Thereafter the matter was thoroughly briefed by counsel of record for both parties, and upon October 15, 1973 a Post Hearing Conference was held at which counsel for the respective parties presented their views orally in lieu of argument. At that time

the Special Master advised counsel of his tentative findings in this cause, which were there discussed orally and again at a second such conference on October 29, 1973, and thereafter were again briefed in the light of such findings, which, as since modified in the light of said discussions and briefings, form the basis for the findings embodied in this report in their final form. The results of these conferences were embodied in an additional post-hearing order entered July 8, 1974.

Joint pre-hearing statements were agreed to by the parties under dates of December 1969 and January 21, 1971. These are reproduced as Appendix A-1 and A-2 hereto. The first of these sets forth in detail the specific issues to be decided by the Special Master as agreed to by the parties. The second establishes an agreed coastline from the Mississippi boundary to Breton Island, thus removing this area from controversy.

On December 20, 1971 and October 16, 1972 the Supreme Court entered Supplemental Decrees defining the seaward-most boundary of the Lousiana claim and the landward-most boundary of the United States claim, thus confining the controversy and the jurisdiction of the Special Master to the areas between the two lines.

While the specific issues set forth in the Stipulation referred to above are numerous, they are related in such a way as to render them capable of being dealt with under three major headings.

A. STRAIGHT BASELINES

Article 4 of the Geneva Convention provides that under appropriate circumstances "the method of straight baselines joining appropriate points may be employed in

drawing the baseline from which the breadth of the territorial sea is measured." Those circumstances are set forth in detail in the article, and there seems to be little doubt that they exist in the case of the Louisiana coastline. Therefore, had the United States seen fit to adopt such a system of straight baselines, it would have been entirely appropriate in the instant case. As Mr. Justice Black points out in his dissent to the second *Louisiana* opinion (394 U.S. 11, 78), had the United States seen fit to adopt such a system, many, if not all, of the difficulties inherent in this case would have been obviated. However, the establishment of such a system of straight baselines can only be by affirmative action on the part of the United States, as Article 4, Subsection 6 of the Geneva Convention requires that "the coastal State must clearly indicate straight baselines on charts, to which due publicity must be given." Such affirmative action has never been taken by the United States.

This is supported by the United States' interpretation of the *Anglo-Norwegian Fisheries Case*, I.C.J. Reports (1951), in which such a system of straight baselines had been affirmatively established by positive action on the part of the coastal nation involved. There is nothing contrary in the case of *The Anna*, (1805) 5 C. Rob. 373, in which it was merely held that islands adjacent to the mainland may form a part of the mainland. In the *California* case, neither party suggested to the Court that the United States had adopted a system of straight baselines, and in fact both specifically disclaimed any reliance upon it. The Special Master in that case prepared his report without reference to any such possibility. And in the second *Louisiana* opinion the Court specifically held:

> "While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the

> selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law." (394 U.S. 11, 72-73)

However, in a footnote (97) to that same opinion, the Supreme Court said:

> "We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone." (394 U.S. 11, 74)

It therefore becomes necessary for the Special Master under this direction to consider each of the contentions of the State of Louisiana as to various actions taken by the United States prior to the initiation of this litigation which Louisiana contends amounts to the adoption of a system of straight baselines.

1. *The Inland Water Line.* This is the line demarking the waters within which the rules of navigation codified at 33 U.S.C. §§ 152-232 promulgated pursuant to Act of February 19, 1895, 28 Stat. 672, as governing the navigation of all vessels "on the harbors, rivers and inland waters of the United States", are to apply. The history and legislative background of these rules is given fully in the second *Louisiana* opinion, where the Court says:

> "By the long-standing, continuous, and unopposed exercise of jurisdiction to regulate navigation on waters within the 'Inland Water Line,' the United States is said to have established them as its inland waters under traditional principles of international law. Alternatively, Louisiana suggests that, even assuming the exclusivity of the Convention on the Territorial Sea and the Contiguous Zone, the 'Inland Water Line,' by virtue of this assertion of sovereignty, has created 'historic bays' within the exception of Article 7 of the Convention. We have concluded, however, that nothing in either the enactment of the 1895 Act or its administration indicates that the United States has ever treated that line as a territorial boundary." (394 U.S. 11, 21-22)

This would appear to conclude the matter insofar as the Special Master is concerned, as only those issues not decided by the Court itself are referred to him for consideration. The State of Louisiana apparently continues to argue, however, that because the Act authorizing the Inland Water Line refers to "inland waters of the United States," the waters enclosed within that line must necessarily be inland waters within the meaning of the Submerged Lands Act. This argument has already been passed upon by the Supreme Court in the second *Louisiana* opinion:

> "Congress, it is said, must have contemplated that a technical term such as 'inland waters' should have the same meaning in different statutes. The phrase appears, however, in quite different contexts in the two pieces of legislation. While the Submerged Lands Act established boundaries between the lands of the States and the Nation, Congress' only concern in the 1895 Act was with the problem of navigation in waters

> close to this Nation's shores. There is no evidence in the legislative history that it was the purpose of Congress in 1953 to tie the meaning of the phrase 'inland waters' to the 1895 statute." (394 U.S. 11, 19)

Here again, the argument advanced by the State of Louisiana appears to have been fully answered by the Supreme Court in its opinion. However, lest there be any doubt it is now specifically held that the Inland Water Line does not constitute a system of straight baselines within the meaning of Article 4 of the Geneva Convention and therefore does not delineate the outer boundaries of inland waters of the United States or of the State of Louisiana.

2. *The Chapman Line.* This line was originally drawn in 1950 by the United States as a proposed method of implementing the Court's decree in *United States* v. *Louisiana,* 339 U.S. 699, 340 U.S. 899. When, in 1956, the Chapman Line was adopted in the Interim Agreement of that year as a tentative basis for allocating revenues from the disputed areas pending the outcome of the litigation, it was stipulated that the United States would not be bound by the line. As the Supreme Court notes in Note 97 to the second Louisiana opinion:

> "No inference or conclusion of fact or law from the said use of the so-called 'Chapman-Line' or any other boundary of said zones is to be drawn to the benefit or prejudice of any party hereto . . . ." (394 U.S. 11, 73-74)

Clearly then the Chapman Line was not drawn in accordance with the principles and methods embodied in Article 4 of the Geneva Convention so as to give it force in international law. Furthermore, in the stipulation of January 21, 1971, it is stated as follows:

> "Louisiana recognizes, however, the United States' position that these are not wholly inland waters, and agrees that Louisiana does not and will not base its arguments regarding the inland status of these or any other waters in this or any future litigation between it and the United States upon this stipulation, upon the action of the United States in fixing the Chapman Line in this area, or upon prior concessions regarding this area made by the United States for the purpose of this and the predecessor case, *United States* v. *Louisiana*, 339 U.S. 699."

In view of the foregoing, it clearly appears that the Chapman Line does not meet the requirements of Article 4 of the Geneva Convention for a system of straight baselines, and it is now specifically so held.

3. *The Louisiana* v. *Mississippi Chart*. Louisiana also insists that the chart which appears as an illustration to the opinion of the Supreme Court in *Louisiana* v. *Mississippi*, 202 U.S. 1 (1906), constitutes a system of straight baselines. There are, however, many arguments which mitigate against this. In the first place, there are three different versions of this chart attached to the opinion, none of which purports to have any high degree of accuracy. Secondly, the purpose of the diagram was to illustrate the eastern boundary of Louisiana, and not to establish the maritime boundary of the state. Thirdly, it was utilized by the Supreme Court for purposes of its opinion on that issue, and not by any executive or other branch of the United States government having to do with foreign affairs. And fourthly, the line on the diagram is obviously not a straight baseline of any kind, but an attempt to follow the coastline at a distance of one marine league. In fact, the court quite specifically says:

"Questions as to the breadth of the maritime belt or the extent of the sway of the riparian States require no special consideration here. The facts render such discussion unnecessary." (202 U.S. 1, 52)

4. *Census Boundaries.* The object of a national census is obviously to determine certain statistical information for the internal use of the nation involved, and not to establish international boundaries; however, the State of Louisiana insists that the line established in 1937 by the Department of Commerce for purposes of the 1940 census (*Proudfoot, Measurement of Geographic Area* 33, U.S. Dept. of Commerce [1946]) constituted the adoption of a straight baseline system. This determination was made, however, many years before the adoption of the Geneva Convention, for purposes totally unconnected with it; and the results were certainly never clearly indicated on charts which were given due publicity to the nations of the world. It therefore follows that whatever their validity may have been for internal purposes, the census line established in 1937 did not constitute a system of straight baselines within the meaning of the Geneva Convention for purposes of establishing a boundary to the inland waters of the United States and the State of Louisiana.

5. *Bird Sanctuaries.* The State of Louisiana insists that the executive orders of President Theodore Roosevelt establishing bird sanctuaries at Tern Islands and Shell Keys respectively established systems of straight baselines around those areas which are now entitled to be recognized under the Geneva Convention. Even a cursory glance at these orders and the diagrams attached to them, will, however, serve to dissipate this impression. In neither case is there a system of straight lines drawn from point to point, but merely a roughly drawn circular line enclosing an area in which there is both land and water, the line having reference to no particular points

of land whatsoever. The purpose is obviously not to establish a boundary between inland and territorial waters, but to establish a limit within which bird life will be protected to the extent established by the order itself.

These orders are specific in their wording as to what is included within their jurisdiction. The first of them refers to "all small islets, commonly called mudlumps in or near the mouths of the Mississippi River, Louisiana, located within the area segregated and shown upon the diagram hereto attached and made a part of this order."

The second refers to "these islets, located within the area segregated and shown upon the diagram hereto attached and made a part of this order." In both cases, clearly the intent was to set aside land areas within the circular line drawn upon the diagram as bird sanctuaries, and not to set aside the entire area within the line itself.

The State of Louisiana, however, makes much of the fact that as the birds to be protected under these executive orders are water fowl, this cannot be done adequately unless the waters adjacent to the land areas included in the reservations are controlled as well as those land areas themselves, citing *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918). The circumstances in that case, however, appear to be quite different; nor does the holding compel the conclusion that in the case of the Tern Island and Shell Keys reservations it was the intent of the executive order to include the intervening waters. Certainly by designating the islands themselves as bird sanctuaries, the territorial waters surrounding those islands were included within the protection of the order, which it appears would be more than sufficient to give the water fowl the needed protection. It being unnecessary to extend the meaning of the executive orders further to accomplish their purpose, no such meaning or intent should be read

into them. It therefore follows that these two executive orders did not establish a system of straight baselines within the meaning of Article 4 of the Geneva Convention. Accordingly Issues 1(a), 11(d) and 12(e) must be answered in the negative.

B. HISTORIC BAYS

Subsection 6 of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone provides that the provisions of the Convention in regard to juridical bays "shall not apply to so-called 'historic' bays." Throughout this litigation, the State of Louisiana has contended that certain bays along its coast line come within the definition of historic bays, and therefore qualify as bays within the meaning of the Convention even though they do not meet its test as juridical bays.

In the second *Louisiana* opinion, after discussing the concept of historic bays, the Court says:

> "But because the concept of historic waters is still relatively imprecise and its application to particular areas raises primarily factual questions, we leave to the Special Master—as we did in *United States* v. *California*—the task of determining in the first instance whether any of the waters off the Louisiana coast are historic bays." (394 U.S. 11, 75)

As the Court notes, the definition of historic waters under the Convention is imprecise. However, in its opinion the Court lays down certain guidelines for making this determination. For example, it says:

> "As we said in *United States* v. *California*, it is generally agreed that historic title can be claimed only when the 'coastal nation has traditionally asserted and

maintained dominion with the acquiescence of foreign nations'. 381 U.S., at 172, 14 L.Ed.2d at 317." (394 U.S. 11, 23)

To this statement is appended a note (Note 27) which reads as follows:

"A recent United Nations study recommended by the International Law Commission reached the following conclusions:

'There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient.' Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B. Int'l L. Comm'n 1, 13, U.N. Doc. A/CN.4/143 (1962)." (394 U.S. 11, 23-24)

It has already been noted in connection with the Inland Water Line that the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters. At most, such control

of navigation, which is recognized by Article 17 of the Convention on the Territorial Sea and the Contiguous Zone to be proper within territorial waters, can form an historic basis for a claim to such waters. And as the Supreme Court held in the first *Louisiana* opinion that the State of Louisiana has no claim to any territorial sea and no rights therein other than those given it by the Submerged Lands Act, such activities can give rise to no claim on its part of any nature whatsoever.

The State of Louisiana, however, insists that both before and after the Geneva Convention, it has exercised over certain, if not all, of the disputed areas sovereignty of a type consistent only with inland waters, and that there has never been any protest either by any foreign power or by the United States as to the exercise of this sovereignty. This consists of the granting by the State of Louisiana of certain oyster and mineral leases; the regulation by it of fishing in the waters in question, including the exclusion of unlicensed vessels and in at least one instance the arrest of foreign unlicensed fishermen in those waters; the enforcement of pollution control regulations in the area; and the protection of wildlife in the area by both the State of Louisiana and the United States. The factual evidence presented in support of these allegations, which is not disputed by the United States and therefore for purposes of this report must be taken as true, is detailed in Appendix B. The question then arises whether these acts amount to an exercise of sovereignty sufficient to establish the areas in question as historic inland waters.

The State of Louisiana puts particular emphasis upon the failure of the United States to object to the various activities on its part enumerated above, calling attention to the Court's statement that its claim of historic waters

is to be treated as if it were being made by the national sovereign and opposed by another nation. However, whatever its position may have been theretofore, it is obvious that with the filing of the suit which resulted in the first *Louisiana* opinion the United States did not acquiesce in such activities but vigorously opposed the claim of the State of Louisiana, and has done so continuously since.

The State of Louisiana takes the position, however, that if its claim to historic title had already ripened because of past events prior to the time when it was first called into question in a domestic lawsuit, it would be an impermissible contraction of territory to permit the United States to defeat that claim by the filing of that suit. This is in accord with the holding of the second *Louisiana* opinion (see 394 U.S. 11, 73, Note 97, and 394 U.S. 11, 77, Note 104).

It is therefore necessary to determine whether the State of Louisiana at any time exercised such sovereignty over the areas in question as to give it the right to claim those areas as internal waters. Concededly prior to the first Louisiana opinion it was claiming those areas as part of its territorial sea, but in that decision that claim was held invalid.

The United States has disclaimed any intention on its part of seeking to establish any inland waters along the coast of the State of Louisiana on historic principles. In fact, the very filing of the present suit and its vigorous prosecution itself constitutes such a disclaimer. In a letter dated April 8, 1969 from Leonard C. Meeker, Legal Adviser, Department of State, to Erwin N. Griswold, Solicitor General, Department of Justice (U.S. Exhibit 108) it is stated:

> "We are not aware of any foreign waters which have been recognized as historic by the United States."

In a later letter dated April 14, 1970 from John N. Mitchell, Attorney General of the United States, to William P. Rogers, Secretary of State of the United States (U.S. Exhibit 114) it is further stated:

> "[T]he Department is unaware of any evidence regarding a claim by the United States Government of historic bays in any other area which would not now qualify as a legal bay under Article 7, paragraphs 1-5, of the Convention on the Territorial Sea and the Contiguous Zone."

In April 1971, the United States published a set of 155 maps delimiting the three mile territorial sea, the nine mile contiguous zone and certain internal waters of the United States, including the boundaries for the entire coast of Louisiana (U.S. Exhibit 416D). These maps are available for sale to the general public and have been distributed to foreign governments in response to requests to the United States Department of State for documents delimiting the boundaries of the United States. As shown thereon, those boundaries are entirely consistent with the position taken by the United States in this litigation, and do not include any historic bays along the coast of Louisiana which would not otherwise qualify as juridical bays.

The determination of the national boundaries is ordinarily a political and not a judicial function; *Jones* v. *United States*, 137 U.S. 202 (1890); *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948). This does not, however, preclude the courts from inquiring into the actual position taken by the sovereign in regard to specific waters, as opposed to its declared position. In the *California* case, the Court held that the legislative history of the Submerged Lands Act reveals that Congress meant to leave the definition of inland waters to the Courts and this holding was adopted insofar as the present litigation is concerned in

the second *Louisiana* opinion. However, it seems clear that the function of the Court is merely to interpret the executive intent and not independently to fix its own boundaries. In the *California* case, the Court also made the following holding:

> "The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive." (381 U.S. 139, 175)

In the second *Louisiana* opinion, the Court adopted the quoted language from the *California* case, and added:

> "Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.
>
> "While we do not now decide that Louisiana's evidence of historic waters is 'clear beyond doubt,' neither are we in a position to say that it is so 'questionable' that the United States' disclaimer is conclusive. We do decide, however, that the Special Master should consider state exercises of dominion as relevant to the existence of historic title." (394 U.S. 11, 77)

The question therefore appears to be whether the evidence supporting its claim to historic title offered by the State of Louisiana, which as has been stated is undisputed, is "clear beyond doubt" to the effect that such sovereignty was exercised over those waters as to establish them as historic inland waters, or whether that evidence is so "ques-

tionable" as to make the disclaimer of the United States conclusive. It has already been noted that under the second *Louisiana* opinion, the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters, as it is an accepted, permissible regulation of the territorial sea itself.

All of the oyster leases relied upon by the State of Louisiana as a basis for its historic waters claim (Louisiana Exhibit 67) cover areas located within three miles of the shoreline, as is admitted by the State of Louisiana in its brief (Vol. II, page 92). The same is true of oyster leases in Caillou Bay (Louisiana Exhibits 75-76). It is apparently Louisiana's contention that the granting of these leases is consistent only with the establishment of the waters in the area as inland waters; but traditionally international law has recognized the right of the coastal state to control fishing, including oystering, within its territorial sea. At all times pertinent to these proceedings, the United States has claimed a territorial sea of at least three miles from the low-water mark in the areas where these leases were granted, and therefore they are entirely consistent with that claim even though made prior to the United States' claim to the continental shelf in 1945. They therefore are not evidence that the waters covering the leased areas are historic inland waters.

The same is true of the mineral leases granted in the East Bay and Caillou Bay areas (Louisiana Exhibits 86, 87, 90 and 91), issued prior to the United States' claim to the resources of the entire continental shelf in 1945. While certain of those leases purport to cover all areas subject to the jurisdiction of the State of Louisiana in East Bay and Caillou Bay (La. Exhibits 188 and 192), there is no evidence that any of these leases extended more than three miles from the low-water line of the shore,

and therefore they too are entirely consistent with the character of the waters covering the leased areas as territorial seas. All other leases offered by Louisiana in support of its position were issued after the United States claimed the resources of the entire continental shelf, and therefore could not put any nation on notice that an historic inland waters claim was being made.

As to the steps taken for the conservation of wildlife by both the United States and the State of Louisiana, this has already been dealt with in connection with the Tern Islands and Shell Keys reserves, where it was shown that only the islands themselves and their surrounding territorial seas were intended to be included in the proclamations.

The regulation of fishing within the territorial seas off the coast of the States to the extent that it does not conflict with federal law has long been recognized. See *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891); *Skiriotes* v. *Florida*, 313 U.S. 69 (1941); *Toomer* v. *Witsell*, 334 U.S. 385 (1948).

Only one specific incident is cited by the State of Louisiana in which an arrest was made beyond the three mile zone. This was described in the testimony of Joseph Billiot, who stated that on one occasion in 1946 or 1947 three Mexicans were arrested in East Bay about 4.3 miles east of Southwest Pass. He could not remember the names of the vessels nor of the individuals, and no record of the arrest was introduced. Nor was any notice to or acquiescence on the part of the Mexican Government ever indicated.

It can hardly be said that this isolated incident meets the tests set forth earlier for establishing sovereignty sufficient to support a claim of historic waters. Certainly

no continuity is indicated, nor any acquiescence by a foreign government. In the *California* case there was cited a similar isolated criminal prosecution, *People* v. *Stralla*, 14 Calif. 2d 617, 96 P. 2d 941 (1939), although the defendant in that prosecution was apparently a United States citizen and not a foreigner. Describing this as the "only assertion of criminal jurisdiction of which we have been made aware" (381 U.S. 139, 174-175), the court held it insufficient to support a finding of historic waters.

Finally, the State of Louisiana asserts that it has exercised pollution control over a portion of the waters in controversy. However, the operative statute (Louisiana Act 68 of 1932) merely recites that it applies to "any waters in the State," and there is no evidence that Louisiana enforced any pollution regulations more than three miles from shore, except in connection with mineral operations after 1947. In the absence of conflicting federal regulations, a state has power to control pollution in its territorial waters if it may affect its inland waters or its shore (see *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 [1973]). Any acts of the State of Louisiana in connection with pollution control in waters off its shoreline were entirely consistent with the character of those waters as territorial sea, and therefore do not furnish a basis for establishing them as inland waters.

From the foregoing it is apparent that there is no basis for Louisiana's claim of historic inland waters extending beyond the limits of its coastline as determined by Section 2(c) of the Submerged Lands Act as interpreted by Subsections 1 through 5 of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, Subsection 6 thereof having no application to the facts in this case, even though undisputed. All of these facts are as consistent with a claim of territorial seas which Louisiana

was asserting to the extent of 27 miles from its shore line from 1938 to 1953 (Louisiana Act 55 of 1938) and nine miles from its shoreline from 1954 until the Court's decision of 1960 (Louisiana Act 33 of 1954) as they are with any claim of inland waters. Far from being clear beyond doubt, the evidence here adduced resembles that introduced in the California case which was held to be questionable, and therefore insufficient to support a finding of historic waters in the face of a contrary declaration by the United States. It is also similar to that presented before the Special Master in *United States* v. *Florida*, No. 52, Original, which he held not to be sufficient to meet the test (see pp. 42-46 of his report). The Special Master is constrained to make a similar finding in the instant case, and therefore Issues 1(d), 1(e), 11(c) and 12(d) as amended must be answered in the negative.

C. JURIDICAL BAYS

It remains, then, to determine the coastline of the State of Louisiana without reference to historic inland waters or to a system of straight baselines. In order to do this, it is necessary to determine the closing lines of a number of juridical bays which occur within that coastline. This, as was held in the *California* case and reaffirmed in the second *Louisiana* opinion, must be done in accordance with the Convention on the Territorial Sea and the Contiguous Zone. The applicable article is Article 7, Subsections 1 through 5 of which (Subsection 6 dealing with so-called "historic" bays having been heretofore held to have no application) read as follows:

"ARTICLE 7

"1. This Article relates only to bays the coasts of which belong to a single State.

"2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

"3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line adjoining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

"4. If the distance between the low-water marks of the natural entrance points of the bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

"5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length."

In order to determine the southern coastline of Louisiana, it is necessary to apply these rules to the physical

contours of that coastline as they appear from the evidence in the record, either undisputed or as found by the Special Master. This requires some discussion of the applicable rules of evidence which are determinative of the facts to which these rules are to be applied.

The standard to be applied is established by the Convention itself. In Article 3 it provides:

> "Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

However, for purposes of this litigation the parties have stipulated that the applicable high and low-water lines shown on a set of 54 maps filed with the Special Master may be taken as correct, except where the right is specifically reserved by one of the parties to show otherwise. In most cases, therefore, it is unnecessary to go beyond these maps to establish the low-water line along the Louisiana coast. Where this reservation has been made, large-scale charts officially recognized by the coastal state are to be looked to in order to determine the location of the low-water line. There appears to be no dispute that a chart whose scale is 1 to 80,000 or larger is a large-scale chart within the meaning of the convention. However, it appears that even these large-scale charts are not conclusive in every instance. For example, in Note 48 to the second *Louisiana* opinion (394 U.S. 11, 40-41), the Court specifically leaves to the Special Master the determination as to the existence or non-existence of certain islands located within Atchafalaya Bay, and also an artificially created spoil bank at Pass Tante Phine, just to the north of West Bay. Some of these formations appear on large-scale charts officially recognized by the coastal state and yet the Court

indicates that their actual existence may be questioned. Therefore, the Court must be saying as a general principle, as insisted by the United States, that at least in certain instances the Special Master may look beyond the charts of the area involved to the actual facts. If the United States is to have the benefit of this rule, it would appear that the State of Louisiana should also have that benefit in areas where it has reserved a special exception to the accuracy of the set of 54 maps, and where the departure from the large-scale charts of the area, if it exists, is so substantial as to affect materially the location of the coastline.

Therefore, Issues 5(a), 6(a) and 8(a) must be answered by reference to Article 3 of the Convention specifying "large-scale charts officially recognized by the coastal State." Issues 5(b), 6(b) and 8(b) must be answered in the affirmative, except where the parties have stipulated to the contrary, and except where evidence of the physical facts shows the large-scale charts to be inaccurate in a material respect. And Issues 5(c), 6(c) and 8(c) must generally be answered in the negative, to the extent that evidence of physical facts contradicting the showing of large-scale charts officially recognized by the coastal State may be introduced under certain circumstances to show material inaccuracies in those charts, specific rulings thereon depending upon the actual facts as shown by the evidence.

It now remains to apply these rules of evidence to the facts in the record of this case, either undisputed or as found by the Special Master. In order to facilitate this, the Louisiana coastline will be considered in various segments proceeding from east to west, except for East Bay which, because of its unique problems, will be considered first.

1. East Bay

In the second *Louisiana* opinion, the Supreme Court specifically rejected the contention of the State of Louisiana that the entire area between Southwest Pass and South Pass constituted a single juridical bay, saying:

> "Another issue involving the semicircle test arises in East Bay in the Mississippi River Delta. Since East Bay does not meet the semicircle test on a closing line between its seawardmost headlands—the tip of the jetty at Southwest Pass and the southern end of South Pass—it does not qualify as a bay under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. There is a line which can be drawn within East Bay, however, so as to satisfy the semicircle test." (394 U.S. 11, 53-54)

The Court then goes on to reject Louisiana's argument that under these circumstances a "fall-back" line should be established as in the case of an over-large bay, saying:

> "The analogy is unsound. A bay whose mouth is wider than 24 miles is nevertheless a bay. But an indentation that does not meet the semicircle test is not a bay but open sea. If an indentation which satisfies the semicircle test is a true bay, therefore, it cannot be on the theory that the closing line carves out a portion of a larger bay. The enclosed indentation must by its own features qualify as a bay.
>
> The United States argues that the area within East Bay enclosed by Louisiana's proposed line does not constitute a bay because there is no 'well-marked indentation' with identifiable headlands which encloses 'landlocked' waters. Indeed, it is said, there is not the slightest curvature of the coast at either asserted entrance point. We do not now decide whether

> the designated portion of East Bay meets these criteria, but hold only that they must be met. We cannot accept Louisiana's argument that an indentation which satisfies the semicircle test ipso facto qualifies as a bay under the Convention." (394 U.S. 11, 54)

From this it would appear to follow that although the entire area does not itself qualify as a juridical bay (although it appears to be conceded that prior to 1918 it did so qualify) because of its failure to meet the semicircle test, if a smaller well-marked indentation with identifiable headlands enclosing landlocked waters which meets the semicircle test can be identified within the general area, it will qualify as a juridical bay.

The area between Southwest Pass and South Pass is not semicircular in general shape, but is more nearly V-shaped. The United States contends that within such a formation there can be no "well-marked indentation" enclosing "landlocked" waters. Although the waters of the Mississippi River flow into the area through many small channels, it is not a true estuary in that the major mouth of the river does not empty into it. The Geneva Convention defines a bay as follows:

> "A bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." (Article 7[2])

The physical configuration of the East Bay area would seem to meet this test upon the basis of relationship between the width of its mouth to its depth upon a number of different closing lines, some of which have been suggested by the parties and some of which have not. That the general shape of the enclosed waters is not determinative is indicated by the fact that a number

of similar V-shaped indentations which appear on U. S. Exhibit 416-D are shown with closing lines indicating that they are accepted by the United States as true bays; i.e., Ursus Cove, Portage Bay, Abraham Bay, and Puget Bay. In addition, Egmont Bay, which is quite similar in its configuration, was held to be a juridical bay in *North Atlantic Coast Fisheries Arbitration* (1906), *Scott, The Hague Court Reports,* 141. And in the second *Louisiana* opinion, while specifically declining to decide whether East Bay meets all criteria for a juridical bay other than the semicircle test, the Court says:

> "[A]ll of the areas of the Mississippi River Delta which Louisiana claims to be historic inland waters are indentations sufficiently resembling bays that they would clearly qualify under Article 7(6) if historic title can be proved." (394 U.S. 11, 75, Note 100)

While it has already been held that historic title has not been proven in this case, from the above language it would seem to follow East Bay is such an indentation in the coast that if a closing line can be drawn within it between clearly identifiable headlands so that the enclosed waters meet the semicircle test, then the result is a juridical bay within the meaning of the Geneva Convention.

Louisiana insists that in determining such a closing line, the seawardmost line which meets the requirements must be accepted, and there is much to support this view. In the decree which was entered in the *California* case, the Court said:

> "In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the place of mean lower low water meets the outer-

most extension of the headlands. Where there is no pronounced headland, the line shall be drawn to the point where the line of mean lower low water on the shore is intersected by the bisector of the angle formed where a line projecting the general trend of the line of mean lower low water along the open coast meets a line projecting the general trend of the line of mean lower low water along the tributary waterway." (382 U.S. 448, 451)

It has already been noted that the Supreme Court has considered and rejected a closing line extending from the tip of the jetty at Southwest Pass to the southern end of South Pass, on the ground that a bay with such a closing line fails to meet the semicircle test, although it appears that it would qualify in all other respects. The next seawardmost line urged by the State of Louisiana is referred to by it as Closing Line A and extends between coordinates X = 2,697,850, Y = 117,200 on the east and X = 2,624,995 and Y = 108,700 on the west.

The State of Louisiana suggests that under the Thames Estuary case in determining the area of a bay tributary waters should be included up to the tideline, and intervening land forms should be treated as islands within the bay and also included within the area measured. If this were accepted, the entire lower portion of the State of Louisiana would have to be treated as one gigantic over-large bay, which could only be done as a practical matter if the United States had adopted a system of straight baselines, which as previously demonstrated it has not done. Furthermore, in stating that the bay formed by a closing line as described above did not meet the semicircle test, the Supreme Court has obviously rejected any such contention, thus indicating the adoption of a more

conservative method of measuring the area of the waters in East Bay.

In the alternative, Louisiana offers three other methods of measuring the area of bays having tributary waters. The most liberal of these, designated as method 3, follows all tributary waters up to their confluence with the Mississippi River and includes as part of the area all islands within the low-water mark, but excludes tributary waters if they are also tributary to any other water body. Method 2 is similar, except that it includes in the area measured only those land areas lying in the mouth of tributary waters and within the bay itself. Method 1 is the most conservative, and does not include tributary waters or islands formed by them, closing off their mouths at the point where they enter into the bay. This appears to be the method employed by the United States in making its area measurements.

In urging that this latter method should not be applied, Louisiana relies upon Article 13 of the Geneva Convention which provides as follows:

> "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide of its banks."

On the principle of *expressio unius est exclusio alterius,* Louisiana argues that if a river does not flow directly into the sea but instead into a bay, a straight line should not be drawn across its mouth but instead the low water mark around the shore of the bay should be followed up into the tributary waters. This, however, raises the question as to how far such lines should be followed. As has already been demonstrated, as a practical matter, it cannot be followed to the tideline, as it would

be in a true estuary. On the other hand, to cut off the area of such tributary waters at the point where they connect with the main stream of the Mississippi River appears to be equally arbitrary with cutting them off at the point where they enter into the bay. Furthermore, Article 13 of the Convention does not deal with bays or the measurement of their area, but simply with determining the coastline at a point where a river flows directly into the open sea. In view of the fact that Article 7 by its terms is the only article dealing with bays, the coasts of which belong to a single state, it would appear that the principle cited above does not apply here. In view of this, the most conservative method of area measurement, known as method 1, which does not include tributary waters of rivers and streams flowing into a bay in its area measurement but draws a line from the nearest low-water points across the mouths of such tributary waters seems to be the proper method of making such measurements, as urged by the United States.

Under this method of measurement, closing line A as proposed by the State of Louisiana and described above, fails to meet the semicircle test by several thousand acres. As an alternative, Louisiana has proposed another closing line further inland, extending from coordinate X = 2,685,-325, Y = 133,800 on the east to X = 2,644,940, Y = 134,910 on the west. Upon the method of area measurement here adopted, this too fails to meet the semicircle test by some 820 acres. If this were not the case, either due to the adoption of a more liberal method of water area measurement or due to subsequent erosion in the area established by competent evidence in the record, either of these closing lines might be accepted, as the area which each of them encloses has all of the other characteristics of a true juridical bay.

The State of Louisiana next proposes two closing lines designated B^1 and C^1, both of which concededly satisfy the semicircle test. However, neither of these closing lines has a western terminus that qualifies as a pronounced headland helping to enclose landlocked waters. Closing Line B^1 suffers the additional objection that its eastern terminus is located at approximately the center of Cow Horn Island by applying the so-called "bisector of the angle" method, a technique entirely inappropriate in the physical situation, as there are pronounced headlands in the vicinity.

Using the same point as its western terminus, the State of Louisiana then proposes two further alternative closing lines designated as C and D respectively, one extending to a point on the northern and western tip of a low-water elevation known as Cow Horn Island not appearing upon the stipulated set of 54 maps, but appearing on nautical chart 1272 from 1941 to 1969, located at coordinates $X = 2{,}677{,}650$ and $Y = 138{,}050$, and the other extending to a point on a low-water elevation appearing upon the stipulated set of 54 maps at coordinates $X = 2{,}672{,}315$ and $Y = 141{,}745$. Both of these concededly meet the semicircle test by the most conservative of the methods described above.

Assuming the existence of Cow Horn Island, which if it indeed existed at any time was admittedly either connected to the mainland or so closely related to it that it may properly be deemed an extension of it, both of these also appear to meet the test of enclosing landlocked waters in a well-defined indentation with identifiable headlands. Although the United States argues that the headlands selected by Louisiana for these two closing lines do not meet the necessary requirements as they follow the general contour of the shore and therefore are more

closely related to the entrance to subsidiary pocket bays than to the enclosing of any part of East Bay itself, this argument is untenable as there are numerous examples in the record of similar headlands which have been accepted as the termini of closing lines for bays in other areas. Therefore, if the principle that the seawardmost closing line which meets all of the necessary requirements is to be accepted, then closing line C suggested by Louisiana is a proper closing line if Cow Horn Island actually existed at any time.

The test established by Article 3 of the Geneva Convention for determining the location of the low-water line along a coast is the marking as shown on large-scale charts officially recognized by the coastal State. Cow Horn Island appears upon such charts from at least as early as 1918 to the 24th edition of chart 1272, dated December 6, 1969, in which edition it was removed from the chart and does not appear in subsequent editions thereafter. There is, however, some evidence in the record that at least a remnant of Cow Horn Island continues to exist up until the present day, although it is not clear whether any part of it is above mean low-water. The United States insists that the absence of Cow Horn Island from present day charts requires a finding that Louisiana's proposed closing line C is improper, while Louisiana argues that its proposed closing line C is a proper closing line, either because it became fixed historically prior to the change in the charts on December 6, 1969, or because despite that change Cow Horn Island continues to exist today as a low-water elevation. The evidence in the record, however, is insufficient to support the latter contention, while, as to the former, it has been recognized by the Supreme Court and throughout these proceedings that any coastline which might be established as of a given time is necessarily ambulatory, as due to the natural processes

of erosion and avulsion the coastal area of the State of Louisiana is in a constant state of flux. Accordingly, from the evidence in the record in this case, it follows that Closing Line C as proposed by the State of Louisiana was the proper closing line up to December 6, 1969, and Closing Line D the proper closing line thereafter.

In opposition to this, Louisiana argues that since the preparation of the exhibits upon which the above area measurements are based, there have been substantial erosions in the Louisiana coastline, particularly in the Joseph's Bayou area, which have materially increased the extent of the open water, so that now its proposed Closing Line A meets the semicircle test even by the most conservative methods of measurement. However, the only basis for this statement is certain photographs offered in evidence late in the hearing and others attached to one of its briefs filed long after the evidentiary record was closed, which do show substantial erosion but from which its actual extent cannot be determined. Therefore, if Louisiana is right in its contentions, it would be necessary to reopen the case for further evidentiary hearings in order to establish its position. The present hearings must be terminated at some specific point in time, and the findings of the Special Master made based upon the evidence available as of that time.

Louisiana also insists that if, as has been held, its proposed Closing Line C was a proper closing line prior to December 6, 1969, then as a result it obtained certain vested rights in the area landward of that line of which it cannot now be dispossessed. However, if this were the case, its shoreline would be fixed at the furthest extent to which it ever projected, which would be contrary to the concept of an ambulatory shoreline. But in the second *Louisiana* opinion the Court has said:

> "Any line drawn by application of the rules of the Convention on the Territorial Sea and the Contiguous Zone would be ambulatory and would vary with the frequent changes in the shoreline." (394 U.S. 11, 32)

If such a line is ambulatory in the future depending upon change in the shoreline, then obviously it could have been equally ambulatory in the past, and in this instance this appears to have been the case.

It therefore follows that issue 6(f) must be answered in the affirmative, the natural entrance points of the bays being located at coordinates X = 2,644,940, Y = 134,910 at the western terminus; and at the eastern terminus at coordinates X = 2,677,650, Y = 138,050 prior to December 6, 1969, and at coordinates X = 2,672,315, Y = 141,745 thereafter. Issue 6(e) must also be answered in the affirmative, the date of the change being December 6, 1969. Issue 6(d) must be answered in the affirmative, and likewise Issue 6(c), but only prior to said date.

2. Bucket Bend Bay

Turning now to the easternmost area in controversy (designated as Issue 2 under the statement of issues), it becomes necessary to establish the closing line for Bucket Bend Bay, which is admitted by all parties to be a juridical bay. In order to do this, it is necessary to determine whether there exist in the area islands or low-tide elevations (there appears to be no distinction necessary between them. See second *Louisiana* opinion, 394 U.S. 11, 60, Note 80) which should be considered part of the mainland. The Court has established certain guidelines in the second *Louisiana* opinion for making this determination:

> "While there is little objective guidance on this question to be found in international law, the question

> whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. We leave to the Special Master the task of determining in the first instance—in the light of these and any other relevant criteria and any evidence he finds it helpful to consider—whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the 'coast' within the meaning of the Convention on the Territorial Sea and the Contiguous Zone." (394 U.S. 11, 66)

In a note to this language, the Court points out that the enumeration is intended to be illustrative rather than exhaustive.

The United States places the southeastern terminus of the closing line of Bucket Bend Bay at a point on the mainland at coordinates X = 2,734,900, Y = 209,275. Louisiana, on the other hand, insists that it should be located at coordinates X = 2,738,320, Y = 210,230, on one of several low-water elevations located in the area, although it also offers alternative closing lines for consideration. That such low-water elevations in fact exist is established beyond question by the fact that they appear upon Map 2 of 8 of the set of 54 maps which has been stipulated by the parties to represent correctly the low-water line except where specific reservation to the contrary is made, which was not done in this area. The sole question therefore seems to be whether these low-water elevations should be assimilated to the coast so as to be treated as a part of it.

Applying the test outlined by the Court in the quotation given above, neither the size, distance from the mainland, depth and utility of the intervening waters, shape of the low-water elevations, or their relationship to the configuration or curvature of the coast indicate that they should be assimilated to and treated as a part of the mainland. While it is true that the Court leaves open the possibility of considering other relevant criteria and states that the list given is intended to be illustrative rather than exhaustive, this appears to be intended to leave open the question of whether islands or low-water elevations which meet the five suggested specific criteria may nevertheless fail to qualify as parts of the mainland rather than to suggest that islands or low-water elevations which fail to meet one or more of these specific tests may nevertheless be so assimilated. In any event, there appear to be no other criteria in the case of the low-water elevations under consideration which would lead to a contrary conclusion.

Louisiana alternatively proposes a southeastern terminus for the closing line on the mainland somewhat seaward of the point suggested by the United States. This, too, must be rejected because the configuration of the coast at this point is such that a closing line drawn to it cannot be said to enclose only landlocked waters. The natural entrance point of the bay on the southeast is therefore that proposed by the United States.

The parties also disagree as to the proper northwestern terminus of the closing line for Bucket Bend Bay. The United States proposes a point at X = 2,709,100, Y = 220,995, while Louisiana would place the terminus of the line at X = 2,708,835, Y = 221,440. The considerations just stated with respect to the southeastern terminus also govern here. The natural entrance point of the Bay is more ap-

propriately defined by the point suggested by the United States.

From this it follows that the closing line proposed by the United States must be adopted, and issue 2(b) answered accordingly. Therefore, issue 2(a) must be answered in the negative, and issue 2(b) answered in accordance with the contentions of the United States.

3. Blind Bay

A somewhat similar situation exists in connection with Blind Bay and the adjacent area. A closing line drawn between natural headlands of the bay itself located on the mainland would not affect the location of the three mile zone, and therefore is irrelevant. However, Louisiana insists that the closing line should not be drawn from these points but from certain mudlumps known as the South Mudlumps to others located off of Southeast Pass. Such a line, however, would not include solely landlocked waters in a coastal indentation, but a substantial area of open water beyond the coastal line. Furthermore, the mudlumps in question do not meet the criteria established by the Court for assimilation to the mainland, being quite small in area and removed a considerable distance from it. For this reason, they likewise do not screen the waters of the bay, and cannot be considered to create multiple mouths of it.

Louisiana has introduced a substantial amount of evidence as to the nature and origin of mudlumps, showing that they result from hydraulic forces generated by river action. From this the conclusion is urged that they are fluvial in nature, and therefore should be assimilated to the mainland, wherever located and whatever their size. This, however, does not necessarily follow. Unless the mudlumps, like other islands or low tide elevations,

meet the five specific tests of size, distance from the mainland, depth and utility of the intervening waters, shape, and relationship to the configuration or curvature of the coast, their nature and origin is immaterial, although a non-fluvial origin might be a negative factor if all of these tests were met. While the mudlumps here in question might meet the last three of these specific tests, they fail to meet the first two, and therefore cannot be considered as extensions of the mainland.

Louisiana also argues that under the holding in "*The Anna*", (1805) 5 C. Rob. 373, these mudlumps must be considered as extensions of the mainland as in that case certain mudlumps lying further from the coast were held to constitute such extensions for the purpose therein stated. That purpose, however, was not the determination of closing lines of bays under the Geneva Convention. The Supreme Court has considered this decision in Note 84 of its second *Louisiana* opinion where it says:

> "The United States argues that the decision is not in point because it had nothing to do with the delimitation of bays and merely held, as Article 10 of the Convention now provides, see n. 94 *infra*, that the three-mile belt is to be measured from islands in the same way as from the mainland. But if the Court had been of the view that the three-mile belt extended from islands as well as the mainland, it would not have had to decide that the mud islands were 'deemed the shore.' " (394 U.S. 11, 64)

The Court then considers a number of text writers upon the same subject, from all of which it derives the following conclusion:

> "Our discussion of these authorities should not be taken as suggesting that, under the now controlling Con-

vention on the Territorial Sea and the Contiguous Zone, every Mississippi River Delta mudlump or other insular formation is a part of the coast. We do believe, however, that the origin of the islands and their resultant connection with the shore is one consideration relevant to the determination of whether they are so closely tied to the mainland as realistically to be considered a part of it." (394 U.S. 11, 65)

In the light of the above, the holding in *"The Anna"*, supra, does not require a holding that the mudlumps here under consideration form a part of the coast, but merely establishes that they may do so, if they meet other established criteria, which, as has already been noted, they do not.

Accordingly, it follows that issues 3(a) and 3(d) should be answered in the negative. It then becomes unnecessary to answer issues 3(b) and 3(c).

4. Garden Island and Red Fish Bays

The area which encompasses Garden Island and Red Fish Bays also presents problems similar to those which have already been considered. These relate primarily to a group of mudlumps located below the mouth of Southeast Pass. All parties seem to agree that the nearest of these to the mainland is properly to be considered a part thereof, and that therefore one terminus of the closing line is at coordinates X = 2,725,550, Y = 153,430. It is likewise undisputed that the other terminus of the line is at coordinates X = 2,702,461, Y = 124,148. Both parties likewise concede that the line between these two points should be located somewhat seaward of a straight line between them due to the existence of the mudlumps in the area; but the United States takes the position that this seaward distortion is only to the extent of following the seaward low-

water line of islands or low-water elevations actually intersected by the straight line between the two points, while Louisiana takes the position that the closing line should lie between the seawardmost points on the low-water lines of islands lying entirely seaward of a straight line between the two points indicated. Again, Louisiana's position appears to be predicated upon the premise that these islands either constitute extensions of the mainland or screen the mouth of the bay. The evidence, however, does not support either of these contentions.

For reasons heretofore stated, except for the first of the series of islands on which the beginning point of the closing line is located, the islands in question do not bear the requisite relationship to the mainland at Southeast Pass to constitute extensions thereof. Louisiana insists, however, that once the closing line conceded by the United States is drawn, the waters within that closing line become inland waters and therefore constitute a part of the mainland, and that the relationship of the remaining islands to those inland waters therefore is in reality a relationship to the mainland which is sufficient to constitute them an extension thereof. Furthermore, Louisiana insists that once the nearest of the islands to that line has by this test been established as an extension of the mainland, then the relationship of the next most seaward island to the island so established constitutes it a further extension of the mainland, and thus by a kind of leapfrog relationship the furthest seaward of the islands relates back through the other islands and the waters of the bay to the mainland itself, all together constituting a single extension thereof sufficient to move the closing line seaward to the furthermost point on the low-water line of the furthermost island.

While for some purposes inland waters may be considered a part of the mainland, they are nevertheless waters and not land, and therefore land bodies lying adjacent to them are not assimilable to them as such, but retain their characteristics as islands. It seems apparent that when in its opinion the Court used the term "mainland," it used it to refer to an existing body of land and not to inland waters. Otherwise, a small island lying many miles from the nearest solid land might by virtue of its proximity to a bay closing line be considered an extension of the mainland.

Nor are the additional mudlumps relied upon by Louisiana as causing the closing line to deviate to the seaward sufficient to constitute a screen across the mouth of the bay, as they certainly do not cover a large percentage of the bay's opening, but only a very small portion of it at one terminus. Moreover, they are not located along the natural closing line of the bay, but extend in a seawardly direction from it.

It therefore follows that a closing line between the points indicated above must be adopted with a deviation to seaward only to the extent of following the seaward low-water lines of islands or low-water elevations intersected by it. Consequently issues 4(a) and 4(d) should be answered accordingly, and issue 4(c) in the negative, except for the single island immediately adjacent to Southeast Pass and any islands or low-water elevations intersected by a straight line between the two points described above. It then becomes unnecessary to answer issue 4(b), as even should it be answered in the affirmative, those islands here involved lying seaward of the closing line described and not intersected by it do not by their location and physical characteristics meet the requisite test for the forming of multiple mouths of the bay.

5. South Pass

The sole problem in this area relates to the existence or non-existence of certain mudlumps, which do not appear on the set of 54 maps stipulated by the parties as accurately reflecting the low-water line along the cost of Louisiana. This is one of the areas, however, where the State of Louisiana has reserved an exception to that stipulation and therefore has the right to question the accuracy of those maps.

The investigation of the area which was undertaken as a basis for the preparation of those maps, however, seems to have been of sufficient accuracy to preclude the existence of the mudlumps at that time. This likewise raises a presumption of their prior non-existence, which evidence offered by Louisiana to the contrary is not sufficient to overcome. However, the United States concedes that in 1970 the mudlumps did in fact exist, any lack of indication thereof on pertinent charts to the contrary notwithstanding. Furthermore, the United States concedes that although under the Geneva Convention the low-water line along the coast is to be determined upon the basis of large-scale charts as published by the coastal nation, extrinsic evidence is admissible to show significant deviations on such charts from the actual low-water line, in which case the actual low-water line prevails. Certainly the existence of the mudlumps in question would be such a significant deviation. Accordingly, the United States proposes a line between the tips of the jetties at coordinates X = 2,702,461, Y = 124,148, and X = 2,701,735, Y = 123,905, a salient point on the low-water line of the land formation extending southwesterly from a natural levee of South Pass at coordinates X = 2,699,435, Y = 118,600 and the western shore of an elongated mudlump lying seaward

of that formation between the points X = 2,697,300, Y = 118,500 and X = 2,697,850, Y = 117,200. After January 1970, the United States would also include points on the mudlump in question located at coordinates X = 2,699,695, Y = 116,700 and X = 2,699,815, Y = 116,700 and X = 2,699,815, Y = 116,800.

These points on the low-water line appear to be supported by the evidence in the record; however, if the mudlump in question existed in January 1970 despite contrary indications on charts of the area, then there is no reason to suppose that it did not exist at an earlier time, back to sometime after 1959, the date of the set of 54 maps, the preparatory work which indicated its absence. As early as 1960-61 Dr. Morgan apparently made studies of the area indicating the presence of this particular mudlump, and in 1961 took a photograph of it. Subsequent photographs were also taken in 1963 and 1964 and on other dates thereafter. From this it appears that the existence of the mudlump is well established by extrinsic evidence as early as January 1961 and that the new low-water line suggested by the United States should be adopted as of that date rather than January 1970. Therefore, in response to issue 5(c), Louisiana is entitled to submerged lands measured from islands or low tide elevations shown on chart 1272 except to the extent that that chart may be shown by extrinsic evidence to be significantly inaccurate. Issue 5(d) may be answered by reference to a mudlump which lies between coordinates X = 2,697,300, Y = 118,500 and X = 2,697,850, Y = 117,200, and subsequent to January 1961, another mudlump lying between X = 2,699,695, Y = 116,700 and X = 2,699,815, Y = 116,800, and issue 5(e) by reference to the latter of these two mudlumps.

6. Ascension-Caminada-Barataria Bay Complex

East Bay having already been considered, moving westward the next area reached is that surrounding Ascension, Caminada and Barataria Bays. A basic question which, if answered in the affirmative, will obviate the necessity of dealing with some minor problems in the area, is whether this entire complex defined by a straight line between the tip of the eastern Belle Pass jetty on the west and the tip of the east jetty at Southwest Pass on the east (the outermost closing line, although others also more than twenty-four miles in length could also be drawn) constitutes an over-large bay within the meaning of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. All of the evidence in the record indicates that it does. Certainly its waters are landlocked, or, as sometimes described, *Inter Fauces Terrai*, within well marked natural entrance points. This is supported by the ratio of its depth of penetration to the width of its mouth, for it is almost perfectly semicircular in shape, the classic form of a bay. In this respect, it bears a startling resemblance to Monterey Bay, which was held to be a true bay in the California case. And in the second *Louisiana* opinion the Court has held that it meets the semicircle test, saying:

> "We have concluded, on the other hand, that the area of 'Ascension Bay' does include the Barataria Bay-Caminada Bay complex and therefore meets the semicircle test. Those inner bays are separated from the larger 'Ascension Bay' only by the string of islands across their entrances. If those islands are ignored, the entrance to Barataria and Caminada Bays is sufficiently wide that those bays and 'Ascension Bay' can reasonably be deemed a single large indentation even under the United States' approach. Article 7(3) pro-

vides that for the purposes of calculating the semicircle test, '[i]slands within an indentation shall be included as if they were part of the water areas of the indentation.' The clear purpose of the Convention is not to permit islands to defeat the semicircle test by consuming areas of the indentation. We think it consistent with that purpose that islands should not be permitted to defeat the semicircle test by sealing off one part of the indentation from the rest. Treating the string of islands 'as if they were part of the water area' of the single large indentation within which they lie, 'Ascension Bay' does meet the semicircle test." (394 U.S. 11, 52-53)

If Ascension Bay is an over-large bay within the meaning of the Geneva Convention, then, wherever its natural entrance points may be located, it is necessary to establish a fall-back line 24 miles in length. This Louisiana fixes as a line between coordinates X = 2,406,890, Y = 189,733 and X = 2,550,402, Y = 216,158. With this the United States does not appear to take issue, assuming that Ascension Bay is an over-large bay, which it denies. The first part of issue 7(a) must therefore be answered in the affirmative as to the entire area of Ascension Bay, and the second part thereof by specifying the tip of the east jetty at Belle Pass and the tip of the east jetty at Southwest Pass as the natural entrance points of the bay, although others producing a closing line of more than twenty-four miles could also be selected. The fall-back line for purposes of establishing the coast line can then be fixed as indicated above. In view of this, it becomes unnecessary to answer many of the issues under Sections 8 and 10 of the statement of issues, but some still remain, which can then be disposed of as follows:

(a) The closing line at the mouth of West Bay runs from a point on the north coast of Southwest Pass, at X = 2,615,475, Y = 113,900 (approximately 3.7 miles from the tip of the jetty), to a point a few hundred yards west of the southern mouth of Pass du Bois at X = 2,615,450, Y = 157,770.

(b) The baseline from Pass du Bois to Sandy Point follows the low-water line except where it closes two minor indentations. The first of these is the northern mouth of Pass du Bois whose closing line runs from X = 2,613,550, Y = 164,745 to X = 2,613,585, Y = 166,700. The second is an unnamed indentation just south of Tiger Pass whose closing line runs from X = 2,614,070, Y = 171,910 to X = 2,611,490, Y = 176,505.

(c) There is a low-water area near Pass du Bois shown on large-scale charts prior to December 6, 1969. This area did not in fact exist above mean low water subsequent to that date and is therefore not a part of the coastline at the present time; but prior thereto its seaward low water line formed a part of the above base line.

(d) An artificial spoil bank extending into the Gulf from the northern headland of Pass Tante Phine in 1959 is no longer part of the coast line. This spoil bank did, however, exist as part of the coast line from November 19, 1959 to February 1960.

(e) Another spoil bank existed in the area for two short periods of relevance here but is no longer a part of the coast line. This bank, just north of 29° 10′ north latitude, existed from January 1959 through March 1959 and March 1964 through July 1964.

(f) The area near the mouth of Sandy Point Bay is governed by two salient points on the low-water

line, X = 2,587,400, Y = 205,250 and X = 2,585,000, Y = 206,975, rather than by the closing line proposed by Louisiana.

(g) The area near the entrance to Scofield Bayou is governed by salient points on the low-water line, X = 2,565,940, Y = 212,988 and X = 2,563,010, Y = 214,045, rather than by the closing line proposed by Louisiana.

(h) The area near an unnamed indentation east of Bay Champagne is governed by a salient point on the low-water line, X = 2,376,485, Y = 164,409 rather than by the closing line proposed by Louisiana.

(i) The area at the mouth of Pass Fourchon is governed by salient points on the low-water line, X = 2,367,695, Y = 158,943, and X = 2,366,789, Y = 158,537, rather than by the closing line proposed by Louisiana.

7. Timbalier Bay

Applying the same principles to the Timbalier Bay area, the questions there involved can be disposed of summarily:

(a) The closure of the mouth of Timbalier Bay between the natural entrance points on Timbalier Island and an unnamed island to the east must be defined by a line well landward of that proposed by Louisiana, the result being that such a line would have no effect on the outer limits of waters subject to the jurisdiction of the State of Louisiana which are governed by salient points on the low-water line at X = 2,339,651, Y = 150,598 and X = 2,337,450, Y = 149,987.

(b) The next opening to Timbalier Bay, approximately 3 miles to the west, is likewise so far inland

that the area is governed by salient points on the mainland at X = 2,320,164, Y = 143,811 and X = 2,319,608, Y = 143,421.

8. Caillou Bay

One of the most difficult areas involved in this litigation is that known as Caillou Bay. It is obvious that were it not for the existence of the Isles Dernieres, there would be no question of the existence of a bay at this location, for without them there is no indentation in the coastline enclosing landlocked waters between clearly defined natural entrance points. Therefore those islands cannot be considered as screening islands across the mouth of a bay which would exist in their absence. The only theory on which a bay can be said to exist at all is if the Isles Dernieres are considered as extensions of the mainland so as to form one of its shores.

This argument appears to have been foreclosed by the holding of the Court in the second *Louisiana* opinion where it is said:

> "At several places (here the Court notes [Note 87] that one such place is Caillou Bay) the question is raised whether areas between the mainland and fringes or chains of islands along the coast are inland waters. The parties agree that no article of the Convention specifically provides that such areas are inland waters. Louisiana argues that they are inland waters, under any one of several theories: that such island fringes form the perimeter of bays under Article 7, that straight baselines must be drawn along the islands under Article 4, or that the waters should be deemed 'inland' under general principles of international law which antedate and supplement the Convention on the

> Territorial Sea and the Contiguous Zone. The position of the United States is that such island chains can be taken into account as enclosing inland waters only by drawing straight baselines; yet the decision whether to draw such baselines is within the sole discretion of the Federal Government, and the United States has not chosen to do so.
>
> We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the 'coast,' a term which is used in contrast with 'islands' throughout the Convention. Moreover, it is apparent from the face and the history of the Convention that such insular formations were intended to be governed solely by the provision in Article 4 for straight baselines." (394 U.S. 11, 66-68)

To the first sentence of the second paragraph quoted above, the Court appends the following note:

> "Louisiana does not contend that any of the islands in question is so closely aligned with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description." (394 U.S. 11, 67, Note 88)

Louisiana now insists that the position attributed to it in this note is based upon a misunderstanding; however, this does not alter the fact that regardless of that position, the Court independently reached the conclusion that none of the islands in the Caillou Bay area does fit the description of islands which could realistically be considered part of the mainland. In the absence of such a holding the Special Master would upon the evidence presented before

him be inclined to hold that based upon their size, proximity, configuration, orientation and nature these islands would constitute an extension of the mainland and would therefore hold that Caillou Bay is a juridical bay with a closing line between points at coordinates X = 2,117,317, Y = 143,491 and X = 2,076,201, Y = 189,799. This would appear to be in accord with the view of the Special Master in the case of *United States* v. *Florida*, No. 52 original, in regard to certain of the Florida Keys. But the language of the Court quoted above appears to require a holding that there is no configuration in the area which meets the requirements of a bay, and therefore nothing for which a closing line could be determined. This also disposes of Louisiana's argument in regard to islands lying within or near the mouth of a bay, whether intersected by its closing line or not, as if there is no bay and no closing line in the absence of those islands, then they cannot be intersected by it nor can it be extended around their outward boundaries.

Louisiana, however, maintains that the Court's holding is based on erroneous geographical information and therefore should be disregarded. It has, however, stipulated as to the correctness of the set of 54 maps in this area, and therefore cannot now challenge them by attempting to show the existence of additional land masses or broader low water lines for recognized land masses in the area except on the landward side of the islands where no low water lines are shown upon the set of 54 maps. Even in the light of the new evidence offered, the Special Master would still consider the finding which as indicated above he would make in the absence of a specific directive by the Court to be violative of that directive.

It therefore follows that as issue 11(a) must be answered in the negative under the Court's opinion,

issue 11(b) must also be answered in the negative. Issue 11(e) then becomes immaterial and issue 11(f) must likewise be answered in the negative. Issues 11(g) and (h) need not be answered, and issues 11(i) and (j) are answered in the negative. In determining the low-water line at the rear of the island fringe here involved, as no such line is shown upon the stipulated maps, the contention of Louisiana must be accepted, there being no proof to the contrary.

9. Atchafalaya Bay

The Court in the second *Louisiana* opinion has already held that Atchafalaya Bay is a true bay (394 U.S. 11, 40). The only question therefore is where its proper closing line lies. The location suggested by Louisiana would make that line more than 24 miles in length, and therefore would constitute it an over-large bay and require the determination of a fallback line. The line suggested by the United States, on the other hand, would be less than 24 miles and would therefore require no such determination. In either case, it should be recognized that there are points lying seaward of such closing line which in certain cases would furnish the base for determining the width of the waters subject to the jurisdiction of the State of Louisiana (see *U. S.* v. *Louisiana*, 4th Supp. Decree, 409 U.S. 17, 34 L.Ed.2d 705, 93 S. Ct. 1478 (1972)).

In reaching its conclusion, Louisiana insists that there are low tide elevations west of Point au Fer and on Shell Keys which should be considered part of the mainland, and therefore can be used as natural entrance points for Atchafalaya Bay. However, in each case, the size and location of the elevations makes it impossible realistically

to view them as extensions of the mainland. Alternatively, Louisiana proposes a closing line of more than 24 miles whose eastern terminus on Point au Fer coincides with that selected by the United States but whose western terminus is Mound Point on Marsh Island (instead of South Point proposed by the United States). This, too, must be rejected because the relation of Mound Point to the coast is such that a line drawn to it would include waters that cannot be viewed as "landlocked". The natural entrance to Atchafalaya Bay on the west is clearly South Point.

Issues 12(a) and 12(b) should therefore be answered in the negative, and Issue 12(c) by points located at coordinates X = 1,993,420, Y = 241,930 and X = 1,863,474, Y = 298,772, in accordance with the submission of the United States. Since the closing line between these points does not exceed 24 miles, it is unnecessary to answer Issue 12(d).

CONCLUSION

Based upon the foregoing holdings and the stipulations between the parties, it should be possible to draw a baseline along the entire coast of the State of Louisiana from which the extent of the territorial waters under the jurisdiction of the State of Louisiana pursuant to the Submerged Lands Act can be measured. It is therefore recommended that the parties be ordered to prepare and file such a decree establishing such a line with the Court for entry. If this cannot be done by agreement, further reference may be necessary to the Special Master in order to reconcile differences between the parties. In any event, recognizing

that the coastline is ambulatory, it is recommended that this cause be retained in court for the purpose of determining any future changes therein.

Respectfully submitted,

WALTER P. ARMSTRONG, JR.
Special Master

July 31, 1974

APPENDIX A-1

PRETRIAL STATEMENT

The United States and the State of Louisiana jointly submit the following pretrial statement:

Part A sets out the issues that the parties now believe are before the Special Master under the Supreme Court's order of May 19, 1969. This statement is arranged in geographical sequence according to the areas affected by the various issues, proceeding from east to west. Under each area are stated the issues that affect it; where such an area includes smaller areas affected by particular issues, the smaller areas are listed after the larger area, with the issues affecting each. Although the questions are stated unconditionally, it is understood that in a number of instances the parties propose them alternatively.

Part B states the understanding reached regarding geographical facts.

Part C contains suggestions regarding procedure.

A

1. From Errol Shoal to the western headland of Sandy Point Bay. (U.S.C. & G.S. Charts Nos. 1270 and 1272; Maps 6-7 of 41 and 1-7 of 8, La. Ex. 119 pp. 6-14.)

(a) Did actions of the United States prior to this suit have the legal effect of utilizing straight baselines to delimit inland waters?

(b) Have changes in geographical configurations divested Louisiana of title to any submerged lands in this area?

(c) Have changes in law divested Louisiana of title to any submerged lands in this area?

(d) Does this area include any historic inland waters under principles of international law, particularly at Isle au Breton Bay, East Bay or West Bay?

(e) Does this area include any historic territorial waters under principles of international law, particularly at Isle au Breton Bay, East Bay or West Bay, and if so, what is the effect?

2. From Dead Woman Pass to North Pass. (U.S.C. & G.S. Chart No. 1272; Maps 1 and 2 of 8, La. Ex. 119 pp. 8-9.)

(a) Are there islands or low-tide elevations that should be considered part of the mainland?

(b) What closing line meets the semicircle test?

3. From Pass a Loutre to Southeast Pass, including Blind Bay. (U.S.C. & G.S. Chart No. 1272; Maps 2 and 3 of 8, La. Ex. 119 pp. 9-10.)

(a) Are there islands or low-tide elevations that should be considered part of the mainland?

(b) If the closing line of Blind Bay affects the three-mile limit, where are the natural entrance points between which the closing line should be drawn?

(c) Should islands or low-tide elevations be regarded as forming separate mouths of a bay if one or more direct lines could be drawn between other natural entrance points of the bay so as to run wholly landward of such islands or low-tide elevations?

(d) Are there islands or low-tide elevations at Blind Bay that form separate mouths to it?

4. From Southeast Pass to South Pass, including Garden Island and Redfish bays. (U.S.C. & G.S. Chart No. 1272; Maps 3 and 4 of 8, La. Ex. 119, pp. 10-11.)

(a) Which islands or low-tide elevations off Southeast Pass should be considered part of the mainland?

(b) Should islands or low-tide elevations be regarded as forming separate mouths of a bay if one or more direct lines could be drawn between other natural entrance points of the bay so as to run wholly landward of such islands or low-tide elevations?

(c) Are there islands or low-tide elevations off Southeast Pass that form such separate mouths of the Garden Island-Redfish Bay complex?

(d) Where are the natural entrance points of the Garden Island-Redfish Bay complex?

5. South Pass. (U.S.C. & G.S. Chart No. 1272; Map 4 of 8, La. Ex. 119 p. 11.)

(a) What are the means of proof recognized by the Convention on the Territorial Sea and the Contiguous Zone for ascertaining whether particular elevations are above the level of mean low water?

(b) Does the Convention on the Territorial Sea and the Contiguous Zone control the kind of evidence that may be introduced in this case to identify low-water lines?

(c) Is Louisiana entitled to submerged lands measured from such islands or low-tide elevations as shown on Chart No. 1272 irrespective of evidence to the contrary?

(d) Where are there islands or low-tide elevations off the mouth of South Pass?

(e) Have there been changes in the coast line that would affect the future distribution of revenues heretofore

accrued since June 5, 1959, and, if so, when did the changes become effective?

6. From South Pass to Southwest Pass: East Bay. (U.S.C. & G.S. Chart No. 1272; Maps 4-6 of 8, La. Ex. 119 pp. 11-13.)

(a) What are the means of proof recognized by the Convention on the Territorial Sea and the Contiguous Zone for ascertaining whether particular elevations are above the level of mean low water?

(b) Does the Convention on the Territorial Sea and the Contiguous Zone control the kind of evidence that may be introduced in this case to identify low-water lines?

(c) Is Louisiana entitled to submerged lands measured from such low-tide elevations or low-water lines as shown on Chart No. 1272 adjacent to South Pass but not shown on Map 4 of 8, irrespective of evidence to the contrary?

(d) Are there low-tide elevations or low-water lines in East Bay adjacent to South Pass not shown on Map 4 of 8 but shown on Chart No. 1272?

(e) Have there been changes in the coast line that would affect the future distribution of revenues heretofore accrued since June 5, 1950 and, if so, when did the changes become effective?

(f) Within East Bay, are there any bays as defined by Article 7 of the Convention on the Territorial Sea and the Contiguous Zone and, if so, where are their natural entrance points?

7. From Southwest Pass to Belle Pass: Ascension-Caminada-Barataria Bay complex. (U.S.C. & G.S. Charts No. 1272, 1273 and 1274; Maps 6-8 of 8 and 8-14 of 41, La. Ex. 119 pp. 13-22.)

(a) Is part or all of this area an overlarge bay as provided for by Article 7 of the Convention on the Territorial Sea and the Contiguous Zone and if so, where is its western natural entrance point?

8. From West Bay to Pass Tante Phine. (U.S.C. & G.S. Chart No. 1272; Maps 7 and 8 of 8, La. Ex. 119 pp. 14-15.)

(a) What are the means of proof recognized by the Convention on the Territorial Sea and the Contiguous Zone for ascertaining whether particular elevations are above the level of mean low water?

(b) Does the Convention on the Territorial Sea and the Contiguous Zone control the kind of evidence that may be introduced in this case to identify low-water lines?

(c) Is Louisiana entitled to submerged lands measured from such low-tide elevations or low-water lines as shown on Chart No. 1272 between Pass du Bois and Pass Tante Phine but not shown on Maps 7 and 8 of 8, irrespective of evidence to the contrary?

(d) Where are there low-tide elevations or low-water lines in this area?

(e) Have there been changes in the coast line that would affect the future distribution of revenues heretofore accrued since June 5, 1950, and if so, when did the changes become effective?

9. From Sandy Point Bay to Scofield Bayou. (U.S.C. & G.S. Chart No. 1272; Maps 8 of 8 and 8 of 41, La. Ex. 119 pp. 15-16.)

(a) What are the means of proof recognized by the Convention on the Territorial Sea and the Contiguous Zone for ascertaining whether particular elevations are above the level of mean low water?

(b) Does the Convention on the Territorial Sea and the Contiguous Zone control the kind of evidence that may be introduced in this case to identify low-water lines?

(c) What is the mean low-water line, between 89° 30′ W. and 89° 32′ W.?

(d) Have there been changes in the coast line that would affect the future distribution of revenues heretofore accrued since June 5, 1950 and, if so, when did the changes become effective?

10. Caminada-Barataria Bay complex. (U.S.C. & G.S. Chart No. 1273; Maps 10-12 of 41, La. Ex. 119 pp. 18-20.)

(a) Should islands or low-tide elevations be regarded as forming separate mouths of a bay if one or more direct lines could be drawn between other natural entrance points of the bay so as to run wholly seaward of such islands or low-tide elevations.

(b) Do Grand Isle and the Grand Terre Islands form such separate mouths of the Caminada-Barataria Bay complex?

(c) Where are the natural entrance points of the Caminada-Barataria Bay complex?

11. Caillou Bay. (U.S.C. & G.S. Chart No. 1275; Maps 19-22 of 41, La. Ex. 119 pp. 27-30.)

(a) Should the Isles Dernieres be considered part of the mainland?

(b) Is Caillou Bay a bay as defined by Article 7 of the Convention on the Territorial Sea and the Contiguous Zone?

(c) Is Caillou Bay an historic bay under principles of international law?

(d) Did actions of the United States prior to this suit have the legal effect of utilizing straight baselines to close Caillou Bay?

(e) Should islands or low-tide elevations be regarded as forming separate mouths of a bay if one or more direct lines could be drawn between other natural entrance points of the bay so as to run wholly landward of such islands or low-tide elevations?

(f) Do the Isles Dernieres form such separate mouths of a bay between the points x = 2,157,920, y = 135,521, and x = 2,076,730, y = 189,630?

(g) Where are the natural entrance points of Caillou Bay?

(h) If Caillou Bay is inland waters, how is the three-mile belt measured south of the Isles Dernieres?

(i) Have changes in geographical configurations divested Louisiana of title to any submerged lands in this area?

(j) Have changes in law divested Louisiana of title to any submerged lands in this area?

12. Atchafalaya Bay. (U.S.C. & G.S. Charts Nos. 1276 and 1277; Maps 25-26 of 41 and 1-5 of 5, La. Ex. 119 pp. 33-39.)

(a) Are there low-tide elevations west of Point au Fer that should be considered part of the mainland? (U. S.C. & G.S. Chart No. 1276; Map 1 of 5, La. Ex. 119 p. 34.)

(b) Should the Shell Keys south of Marsh Island be considered part of the mainland? (U.S.C. & G.S. Chart No. 1277; Map 4 of 5, La. Ex. 119 p. 37.)

(c) Where are the natural entrance points of Atchafalaya Bay?

(d) If the distance between the natural entrance points exceeds 24 miles, where should the closing line or lines be drawn?

STIPULATION TO AMEND JOINT PRETRIAL STATEMENT OF DECEMBER 1969

The United States of America and the State of Louisiana hereby amend the Joint Pretrial Statement of December 1969 in this case identified as Exhibit A of the Pretrial Order of the Special Master of April 27, 1970, as follows:

1. Paragraph 8 of Part A is amended by inserting after the words "Pass Tante Phine" in the first line, a comma followed by the words "including its artificial northern outlet at about latitude 29° 10′ 10″ N."

2. Paragraph 9 of Part A is deleted.

3. Paragraph 12 of Part A is amended by adding new paragraphs (d) and (e) as follows:

(d) Are the waters in the vicinity of the Shell Keys south of Marsh Island Historic inland waters under principles of international law?

(e) Did actions of the United States prior to this suit have the legal effect of utilizing straight baselines around the Shell Keys south of Marsh Island?

Respectfully,

/s/ Erwin N. Griswold
Solicitor General of the United States

Jack P. F. Gremillion
Attorney General of the State of Louisiana

Dated:

APPENDIX A-2

STIPULATION

1. For the sole purpose of expediting the ultimate resolution of this case, and without deciding whether Chandeleur or Breton Sounds are inland waters, it is hereby finally stipulated by the United States and Louisiana jointly that the landward limit of the submerged lands of the continental shelf in which the United States has the exclusive right to explore and exploit the natural resources as against the State of Louisiana in the area between the Mississippi boundary and Breton Island is a line three geographical miles seaward from the line hereinafter described, and the State of Louisiana has the exclusive right to explore and exploit the natural resources landward thereof as against the United States.

The said line is as follows:

	X	Y
A line from	2,752,565	568,525
Through	2,775,787	513,796
Through	2,777,512	513,071
Through	2,779,032	512,013
Through	2,780,766	510,417
Through	2,782,059	508,914
Through	2,784,689	505,455
Through	2,788,518	498,898
Through	2,790,051	496,115
Through	2,791,690	491,970
Through	2,794,789	481,712
Through	2,796,202	475,864
Through	2,797,209	468,763

	X	Y
Through	2,797,456	463,898
Through	2,797,455	458,119
Through	2,797,067	452,190
Through	2,795,853	442,333
Through	2,794,722	436,006
Through	2,793,260	430,155
Through	2,790,415	420,878
Through	2,788,165	414,646
Through	2,786,724	410,834
Through	2,783,250	403,219
Through	2,779,673	397,140
Through	2,777,922	394,224
Through	2,776,487	392,403
Through	2,775,343	391,771
Through	2,774,819	390,716
Through	2,774,670	390,293
Through	2,773,972	389,724
Through	2,772,541	387,391
Through	2,770,599	383,887
Through	2,768,775	381,521
Through	2,768,031	380,244
Through	2,767,052	379,676
Through	2,766,408	378,524
Through	2,761,138	371,491
Through	2,758,093	367,862
Through	2,757,465	366,796
Through	2,755,709	364,596
Through	2,755,015	363,480
Through	2,749,221	357,797
Through	2,746,309	355,438
Through	2,744,222	354,125
Through	2,743,352	353,794
Through	2,742,583	353,754
Through	2,727,653	334,120

	X	Y
Through	2,726,852	333,103
Through	2,723,975	330,868
Through	2,722,321	329,172
Through	2,720,696	326,779
Through	2,717,012	320,677
Through	2,715,236	318,391
Through	2,714,633	317,731
Through	2,713,324	316,801
Through	2,711,772	316,107
Through	2,710,380	315,995
To	2,689,683	308,890

with the sole exception that the landward limit may vary seaward in the area behind the line three geographical miles seaward from the line drawn from the point x = 2,737,288, y = 345,654, to the point x = 2,755,325, y = 204,680, if the State of Louisiana prevails in its historic or straight baseline claims to that area.

2. In entering this stipulation, Louisiana maintains its position that the whole of Chandeleur Sound and Breton Sound are inland waters, that straight baselines have in effect been drawn from Mississippi around the Delta and that for this and other reasons and other actions taken by both governments these are historic waters. Louisiana recognizes, however, the United States position that these are not wholly inland waters, and agrees that Louisiana does not and will not base its arguments regarding the inland status of these or any other waters in this or any future litigation between it and the United States, upon this stipulation, upon the action of the United States in fixing the Chapman Line in this area, or upon prior concessions regarding this area made by the United States

for the purpose of this case and the predecessor case, *United States* v. *Louisiana*, 339 U.S. 699.

3. In entering this stipulation, the United States maintains that its agreement is not based on the belief that these are historic inland waters or described by a system of straight baselines, or on any other basis than is set out at pages 120-126 of the Brief for the United States, on Cross-Motions for the Entry of a Supplemental Decree as to the State of Louisiana (No. 2), in this case in 1968, and at pages 76-79 of the Reply Brief for the United States in the same cause. The United States maintains its position, there stated, that those parts of this area which are beyond normal territorial waters measured from closing lines of juridical bays and the low-water line of the mainland and islands are high seas.

4. The agreements as to the series of 54 maps heretofore stated in the Statement of Issues of December 1969 shall stand.

5. It is also agreed that the entire coastline of Louisiana except for the area referred to in Paragraph 1 and the agreements as to the location of the shoreline referred to in Paragraph 4 is in dispute in this litigation without regard to previous agreements made subsequent to the 1969 opinion in this case, and with full opportunity to both parties for discovery and testimony.

Executed this 21st day of January, 1971.

United States of America

By /s/ Erwin N. Griswold
Solicitor General

State of Louisiana

By /s/ Jack P. F. Gremillion
Attorney General

APPENDIX B

1. Title to Louisiana's coastal inland waters passed to the State in 1812 by virtue of its act of admission to the Union. While the United States retained title to all public lands, title to navigable inland water-bodies, including bays, vested in the State of Louisiana upon its admission. This title was confirmed to Louisiana under the doctrine recognized in *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212 (1845). (See 363 U.S. 1, 66 (1960) n. 108.)

2. Commencing in 1870, Louisiana enacted legislation to regulate oyster fishing in its coastal bays.

3. Since 1886 Louisiana has legislatively reaffirmed its title to bays along its coast, including those in the delta. (Acts of 1886, 1892, 1902, 1904, and 1910).

4. Louisiana has granted oyster leases in the shallow waters of many Mississippi delta bays subsequent to the above legislation.

5. Statutes regulating shrimping in Louisiana have defined the inside waters of the delta area (to which stringent closed season laws have applied) as follows:

   Act 103 of 1926:

   > All . . . bays and sounds found along the Louisiana Coast of the Gulf of Mexico.

   Act 143 of 1942:

   > All . . . bays and sounds along the Louisiana coast, and all other waters in and contiguous to the Gulf of Mexico *whether or not partly enclosed by* islands, sand [s]pits, marshes, or *delta fingers,* wherein the water is less than three (3) fathoms in depth.

Act 51 of 1948:

> The inside waters shall include . . . Breton Sound, . . . Blind Bay, Garden Island Bay, East Bay, West Bay . . . and all other bays and sounds along the Louisiana coast. . . .

6. Since the early 1900s the Louisiana Wild Life and Fisheries Commission and its predecessor agency, the Department of Conservation, have from time to time used a system of boat and aircraft patrol in which imaginary lines joining outermost mudlumps and other features marking the seaward terminus of the passes have been utilized to determine a belt of waters lying three miles from such lines for purposes of such patrol.

7. On at least one occasion arrests have been made and fines levied against persons violating Louisiana's statutes inside the areas of the delta described above, regardless of nationality (See 12 below).

8. In patrolling Louisiana's coastal inland waters, enforcement agents of the Conservation Department and the Wild Life and Fisheries Commission have used armed vessels or have themselves been armed and have used armed force to arrest violators of Louisiana's laws.

9. Both United States citizens and foreign nationals, including Japanese, Chinese, Filipino, Mexican, and Spanish fishermen, have been required to obtain Louisiana licenses to fish in Louisiana waters.

10. Licenses of fishermen fishing in Louisiana waters have been checked by Wild Life and Fisheries enforcement personnel without regard to nationality.

11. Regardless of nationality, persons caught fishing without a license within Louisiana waters or three miles

seaward from the mouth of any bay included therein have been arrested and have had charges filed against them by Louisiana enforcement officers.

12. About 1946, personnel on three Mexican fishing vessels were arrested by an aerial law enforcement agent for the Wild Life and Fisheries Commission for violating the closed shrimping season in East Bay. These arrests were made outside of a 3-mile belt from the shore and inside the East Bay closure claimed by Louisiana.

13. Louisiana enacted Act 68 of 1932, Act 367 of 1940, Act 385 of 1948, and Act 386 of 1948 to prevent pollution of State waters.

14. Enforcement agents of the Wild Life and Fisheries Commission have conducted pollution control activities in East Bay consistent with Louisiana pollution control statutes and have issued citations for failure to comply with these regulations.

15. Louisiana issued mineral leases under Act 30 of 1915 as amended by Act 315 of 1926 covering most of the Mississippi delta bays prior to issuance of the Truman Proclamation in 1945. These included Mineral Lease 192 in 1928 covering West Bay and East Bay, Mineral Lease 195 in 1928 covering Grand Bay, Grand Coquille Bay and many other bays to the north of the delta contiguous with Breton Sound, and Mineral Lease 335 in 1935 covering Paddy Bay, Bull Bay, Delta Bend, Quarantine Bay, Breton Sound and Chandeleur Sound. Portions of these leases remain active.

16. Louisiana's claim to waters of the delta lying between and adjacent to the passes of the Mississippi River has never been disputed or questioned by foreign governments, nor was the claim disputed by the United States government until the inception of this lawsuit in 1948.